Supreme Court, U.S.
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No. 05-1126

IN THE

Supreme Court of the United States

BELL ATLANTIC CORPORATION, *et al.*,
Petitioners,

v.

WILLIAM TWOMBLY, *et al.*, individually
and on behalf of all others similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a complaint states a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1, if it alleges that the defendants engaged in parallel conduct and adds a bald assertion that the defendants were participants in a "conspiracy," without any allegations that, if later proved true, would establish the existence of a conspiracy under the applicable legal standard.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government. To that end, WLF has frequently appeared as *amicus curiae* in this and other federal courts to

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

address the proper scope of the antitrust laws. *See, e.g., Texaco v. Dagher*, 126 S. Ct. 1276 (2006); *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 126 S. Ct. 1281 (2006); *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 126 S. Ct. 860 (2006); *Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 298 (2004); *3M Co. v. LePage's, Inc.*, 542 U.S. 953 (2004).

WLF believes that the object of the antitrust laws should be to promote competition and thereby provide consumers with better goods and services at lower prices. Accordingly, producers who compete vigorously – whether by lowering their prices or otherwise taking steps to meet the competition – should generally be applauded. The antitrust laws do, of course, prohibit conspiracies in restraint of trade. But if we require companies to comply with massively expensive discovery requests in antitrust suits that may allege such conspiracies but that provide no specific allegations suggesting that a conspiracy actually took place, WLF fears that business will be conducted less efficiently and the antitrust laws will end up discouraging the very competition they were designed to promote.

WLF has no direct financial interest in the outcome of this case. It is filing due solely to its interest in ensuring that the antitrust laws are used to promote competition, not to enrich plaintiffs' lawyers at the expense of the business community. WLF is filing this brief with the consent of all parties. The written consents have been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

Petitioners are four companies that maintain telephone networks and provide local telephone service in areas covered

by their networks (Incumbent Local Exchange Carriers or "ILECs"). Respondents (referred to herein collectively as "Twombly") are two individuals who complain that the ILECs are not doing enough to facilitate competition in the provision of local telephone service. Specifically, Twombly alleges that Petitioners have conspired, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (2000), not to compete with one another in their respective geographic markets for local telephone and high-speed Internet service, and to prevent competitors from entering those markets. Pet. App. 2a-3a.

Twombly alleges no facts directly indicating that Petitioners entered into an actual agreement to restrain trade. They do not allege, for example, the date (or even the approximate year) of any agreement, where the agreement took place, who among Petitioners' hundreds of thousands of employees entered into the agreement, or why Petitioners would enter into such an agreement given that Petitioners' behavior in resisting competition from Competitive Local Exchange Carriers ("CLECs") is fully consistent with economic self-interest. Instead, the Complaint makes clear, Twombly's conspiracy allegation is based solely on two factual claims: (1) all Petitioners have opted not to enter the CLEC business and compete for customers in the other Petitioners' territories; and (2) a newspaper article attributed to an executive of one of the Petitioners an unwillingness to enter into such competition.

The district court granted Petitioners' motion, filed pursuant to Fed.R.Civ.P. 12(b)(6), to dismiss the complaint for failure to state a claim on which relief could be granted. Pet. App. 35a-58a. The court recognized that in evaluating a Rule 12(b)(6) motion, all facts alleged in the complaint must be accepted as true and "[a]ll reasonable inferences are to be drawn in the plaintiffs' favor." *Id.* 40a. The court nonetheless

held that the facts alleged in the complaint were insufficient to support Twombly's conclusion that Petitioners had "conspired" to restrain trade – and that such an actual agreement among competitors to restrain trade is necessary to establish a cause of action under Section 1. The court said that where plaintiffs base their conspiracy claims on allegations that the defendants have engaged in "parallel action," a complaint must point to at least one "plus factor" that "tends to exclude independent self-interested conduct as an explanation for defendants' parallel behavior." *Id.* 41a. The court determined that where, as here, the complaint consists of nothing more than "'a bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts,'" dismissal of the complaint is warranted. *Id.* 42a (quoting *Heart Disease Res. Found. v. General Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1970)). The court explained that requiring allegations of a "plus theory" is "necessary to give defendants notice of plaintiff's theory of the conspiracy" because:

> [A] plaintiff's factual and economic theory of a conspiracy is not evident from a conclusory allegation of conspiracy, and there is simply no way to defend against such a claim without having some idea of how and why the defendants are alleged to have conspired. The plus factors are therefore intended to give defendants notice of plaintiffs' legal theory, and of the conduct which is alleged to be conspiratorial.

Id. 45a (citation omitted).

The Second Circuit vacated the judgment and remanded for further proceedings. *Id.* 1a-34a. The court concluded that the district court's "plus factor" standard was incompatible with the notice pleading standard of Fed.R.Civ.P. 8(a). The

court held that a complaint that alleges the existence of a conspiracy in violation of Section 1 of the Sherman Act is not subject to dismissal under Rule 12(b)(6) unless "a pleaded conspiracy is implausible on the basis of the facts as pleaded – if the allegations amount to no more than unlikely speculations." *Id.* at 20a (citation omitted). But an antitrust complaint that can pass this "implausibility" test is not subject to dismissal so long as it "contain[s] the 'short and plain statement of the claim showing that the pleader is entitled to relief' that Rule 8(a) requires." *Id.*

The appeals court recognized that permitting complaints of this sort to proceed past the pleadings stage can have significant costs:

> We are mindful that a balance is being struck here, that on one side of that balance is the sometimes colossal expense of undergoing discovery, that such costs themselves likely lead defendants to pay plaintiffs to settle what would ultimately be shown to be meritless claims, that the success of such meritless claims encourages others to be brought, and that the overall result may well be a burden on the courts and a deleterious effect on the manner in which and efficiency with which business is conducted.

Id. at 30a. The court said that despite those costs, it was constrained by Rule 8(a) to permit the suit to proceed through discovery. *Id.* While conceding that "the amended complaint does not identify specific instances of conspiratorial conduct of communications," the appeals court said that it met the minimum standards of Rule 8(a) because "it does set forth the temporal and geographic parameters of the alleged illegal activity and identifies the alleged key participants." *Id.* 31a.

REASONS FOR GRANTING THE PETITION

This case presents an issue of exceptional importance to hundreds of thousands of federal court litigants throughout the United States: what level of specificity must be included in allegations set forth in a complaint, for the complaint to survive a Rule 12(b)(6) motion to dismiss for failure to state a claim? Petitioners have ably demonstrated that the federal appeals courts are sharply divided on that question in the context of antitrust cases, thereby warranting the Court's review.

WLF is writing separately to emphasize that the issue arises just as frequently outside the antitrust context. This Court's decisions have established several ground rules for determining the adequacy of the allegations of a complaint:

(1) Fed.R.Civ.P. 8(a)(2) provides that, in setting forth a claim in a pleading, a party need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief"; the only exception is that, pursuant to Fed.R.Civ.P. 9(b), in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity;

(2) The "short and plain statement of the claim" does not adequately show that the pleader is entitled to relief unless it provides the defendant "fair notice" of what the plaintiff's claim is and the grounds upon which it rests;

(3) Defendants have not been provided "fair notice" if they are "left to guess," *Christopher v. Harbury*, 536

> U.S. 403, 418 (2002), at the essential features of the grounds upon which the claim rests.

The decision below has established a standard for evaluating the adequacy of the allegations of a complaint that is significantly less demanding than the already-lenient standard contemplated by Rule 8(a) and this Court's prior decisions. The Second Circuit has decreed that a complaint can survive a Rule 12(b)(6) motion to dismiss if it alleges a "conspiracy" but fails to allege any facts that, if later proved, would establish the existence of a conspiracy, so long as the alleged conspiracy is not "implausible on the basis of the facts as pleaded – if the allegations amount to no more than unlikely speculations." Pet. App. 20a. That standard is difficult to square with one that requires a complaint to provide "fair notice" of the claim; simply because it is not "implausible" that some unspecified employee of a large company at some unspecified time and place entered into a conspiracy does not mean that the company has "fair notice" of the nature of the alleged conspiracy. Review is warranted to resolve the conflict between the decision below and the decisions of this Court and other courts of appeals.

Review is particularly warranted because of the enormous unjustified expense that a defendant incurs if its Rule 12(b)(6) motion to dismiss is denied under an inappropriately lenient pleading standard and it is forced to defend the suit through the discovery phase. As the Second Circuit recognized, the expense of undergoing discovery is "sometimes colossal," and "such costs themselves likely lead defendants to pay plaintiffs to settle what would ultimately be shown to be meritless claims." *Id.* at 30a.

Unfortunately, WLF has seen evidence that all too often, federal courts have permitted suits to continue beyond the

pleading stage based on nothing more than idle speculation that the defendant may have engaged in wrongdoing. While some such suits have involved alleged antitrust conspiracies, the problem is by no means confined to that area of the law. This brief describes several other areas of the law where the problem is also rampant. Review is warranted to permit the Court to make clear that all complaints – not just those raising antitrust conspiracy claims -- are subject to dismissal under Rule 12(b)(6) if they fail to provide the defendants with fair notice of the grounds upon which the claim rests.

I. THE DECISION BELOW PERMITS A COMPLAINT TO SURVIVE A MOTION TO DISMISS EVEN WHEN THE COMPLAINT FAILS TO CONTAIN SUFFICIENT FACTUAL ALLEGATIONS TO PROVIDE FAIR NOTICE OF THE GROUNDS FOR THE CLAIM

Review of the decision below is warranted because the Second Circuit's pleading standard – which permits a complaint to survive a motion to dismiss even when the complaint fails to contain sufficient factual allegations to provide fair notice of the grounds for the claim – cannot be squared with the prior decisions of this Court.

WLF recognizes that the Federal Rules of Civil Procedure do not impose demanding requirements on those filing pleadings which set forth a claim for relief. Under Fed.R.Civ.P. 8(a)(2), a party, when setting forth a claim in a pleading, need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief." The Court has explained:

> [T]he Rule mean[s] what is sa[ys]: "The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim."

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

Nonetheless, the Court has made clear that "the short and plain statement of the claim" must be sufficient to show that "the pleader is entitled to relief." To meet that standard, the statement must "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley*, 355 U.S. at 47. In *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), the Court explained the "fair notice" requirement in some detail. The plaintiff's complaint alleged that the defendant employer had terminated the plaintiff's employment on the basis of invidious age and national origin discrimination. The Court held that the complaint provided "fair notice" of the claim and the grounds upon which it rested by: (1) detailing the events leading up to the plaintiff's termination, including the names of the individuals involved in those events; (2) providing the relevant dates; and (3) providing the ages and nationalities of at least some of the relevant persons involved with his termination. *Swierkiewicz*, 534 U.S. at 514. In light of those allegations, the Court rejected the employer's claim that the complaint was deficient because it did not provide additional factual allegations to support the claim that the defendant's agents (identified in the complaint) had acted with an improper discriminatory motive. *Id.* at 514-15.

Twombly's amended complaint has come nowhere close to providing the type of "fair notice" provided by the complaint in *Swierkiewicz*. It alleges no facts directly

indicating that Petitioners entered into an actual agreement to restrain trade. It fails to allege, for example, the date (or even the approximate year) of any agreement, where the agreement took place, or who among Petitioners' hundreds of thousands of employees entered into the agreement. Perhaps most importantly, Twombly has failed to explain why Petitioners would enter into such an agreement given that their behavior in resisting competition from CLECs and in not entering a new field (*i.e.*, not becoming CLECs themselves) is fully consistent with economic self-interest. As the district court held, where "parallel action" among competitors is fully explainable as "independent self-interested conduct," the existence of such parallel action provides *no* factual support for a bald conspiracy claim. Pet. App. 41a. Under such circumstances, "fair notice" has not been provided because "there is no way to defend against such a claim without having some idea of how and why the defendants are alleged to have conspired." *Id.* 45a.

The Second Circuit held below that a complaint alleging conspiracy is sufficient to withstand a Rule 12(b)(6) motion to dismiss so long as the alleged conspiracy is not "implausible on the basis of the facts as pleaded." Such a standard totally ignores the "fair notice" requirement. That requirement entails more than an exercise in the plausible. While Twombly has alleged nothing that makes it wholly implausible that Petitioners entered into a conspiracy in restraint of trade, he likewise has alleged nothing to make it any more likely that Petitioners entered into such a conspiracy than that *any other* random set of competitors have entered into such a conspiracy.

The Cou . s decision in *Christopher v. Harbury*, 536 U.S. 403 (2002), is instructive in this regard. The plaintiff in that case alleged that federal government officials had acted wrongfully in denying her access to the courts. She alleged

that the officials had lied to her by telling her that they were unaware of the whereabouts of her husband when, in fact, they knew he was in a Guatemalan jail being subjected to torture – thereby preventing her from filing a court action that might have prevented his eventual execution. Accepting for the sake of decision that such denial of access to the courts constituted a constitutional violation, the Court nonetheless held that the complaint was properly subject to dismissal under Rule 12(b)(6) because it "did not come even close" to stating a claim upon which relief could be granted. *Harbury*, 536 U.S. at 418. Even though the complaint admittedly set out a "plain statement" regarding what the defendants allegedly did wrong, it did not provide "fair notice" to the defendants of the claim because it failed to explain what legal recourse the plaintiff could have obtained if her access to the courts had not been blocked: "Like any other element of an access claim, the underlying cause of action and its lost remedy must be addressed by allegations in the complaint sufficient to give fair notice to a defendant." *Id.* at 416 (citing *Swierkiewicz*, 534 U.S. at 513-15).

The Court said that in a complaint alleging denial of access to the courts, the underlying claim must be pleaded and must have at least an "arguable" basis; the Court held that the claim must "be described well enough" in the complaint to show that its "'arguable' nature" amounts to "more than hope." *Id.* Similarly, Twombly's amended complaint cannot survive a Rule 12(b)(6) motion to dismiss in the absence of allegations indicating that Twombly's conspiracy claim is based on "more than hope." Moreover, as in *Harbury*, in the absence of such allegations, "[t]he District Court and the defendants were left to guess" regarding the who, when, where, how, and why of the alleged conspiracy. *Id.* at 418. Review is warranted because the standard applied by the Second Circuit mandates that complaints such as Twombly's should survive a motion to

dismiss despite their failure to provide a "statement of the claim showing that the pleader is entitled to relief" and to provide fair notice of the claim.

II. THERE IS WIDESPREAD UNWILLINGNESS AMONG THE LOWER FEDERAL COURTS TO GRANT MERITORIOUS RULE 12(b)(6) MOTIONS TO DISMISS, RESULTING IN WASTEFUL LITIGATION AND NUISANCE SETTLEMENTS

The Petition fully explains why the decision below not only conflicts with the prior decisions of this Court and other circuits but also presents a recurring issue of substantial importance in the field of antitrust law. WLF writes separately to stress that review is also warranted because the decision below will have substantial impact in numerous cases not involving Sherman Act Section 1 conspiracy claims. Indeed, the unwillingness of the lower federal courts to grant meritorious Rule 12(b)(6) motions to dismiss has been a widespread problem that has resulted in wasteful litigation and nuisance settlements.

The Second Circuit readily acknowledged that permitting complaints of this sort to proceed past the pleadings stage can have significant costs:

> We are mindful that a balance is being struck here, that on one side of that balance is the sometimes colossal expense of undergoing discovery, that such costs themselves likely lead defendants to pay plaintiffs to settle what would ultimately be shown to be meritless claims, that the success of such meritless claims encourages others to be brought, and that the overall result may well be a burden on the courts and a deleterious effect on the

> manner in which and efficiency with which business is conducted.

Pet. App. 30a. In light of those acknowledged costs, review is warranted to determine whether, as the Second Circuit believed, those costs are really necessitated by the terms of Fed.R.Civ.P. 8(a).

Moreover, those costs – including resulting payments to settle what would ultimately be shown to be meritless claims – are not confined to Section 1 cases. This brief highlights recurring claims in other areas of the law in which the inability of defendants to prevail on meritorious Rule 12(b)(6) motions to dismiss has forced the settlement of numerous suits despite what often appear to be factually insufficient allegations in the complaint.

The Alien Tort Statute. The Alien Tort Statute (ATS), 28 U.S.C. § 1350, provides the federal courts with jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Adopted in 1789, the ATS lay dormant for nearly 200 years until the Second Circuit held in 1980 that federal courts had jurisdiction under the ATS to hear claims that a Paraguayan police officer had tortured a fellow citizen. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). This Court held in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720 (2004), that "Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations." That set of actions includes three offenses recognized by Blackstone in the 18th century – "violations of safe conducts, infringement of the rights of ambassadors, and piracy" – as well as additional actions whose scope the Court did not attempt to define: violations of "the present-day law of nations" that "rest on a norm of international character accepted by the

civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Sosa*, 542 U.S. at 725.

Although the Court warned that the lower courts should exercise "great caution in adapting the law of nations to private rights," *id* at 729, the number of ATS suits pending in federal court has exploded in recent years. A primary target of these suits has been American multi-national corporations whose overseas activities are alleged to violate international law. A common theme of many of these suits is an allegation that foreign governments mistreated their own citizens while providing security for an American corporation's operations, and that the corporation should be found liable in an ATS suit for aiding and abetting the mistreatment. *See, e.g.*, Daniel Diskin, *The Historical and Modern Foundations for Aiding and Abetting Liability under the Alien Tort Statute*, 47 ARIZ. L. REV. 805 (2005) (collecting cases).

Despite the absence in most such cases of factual allegations that the American corporations played any direct role in a foreign government's alleged mistreatment of its citizens, corporate defendants have had very little success in prevailing in Rule 12(b)(6) motions to dismiss the suits. The lower federal courts have accepted non-specific allegations that the corporate defendants aided and abetted the foreign government as sufficient to withstand a motion to dismiss.

Perhaps the best-known example of the huge costs imposed on corporate defendants by ATS suits raising insubstantial claims of human rights violations is a suit filed against Unocal Corp. in connection with its construction of a natural gas pipeline in Burma (now Myanmar). The plaintiffs, 15 Myanmar citizens, alleged that government soldiers providing security for the pipeline engaged in murder, torture,

rape, and forced labor – in violation of international law. They sued Unocal for allegedly aiding and abetting in those violations. Despite the absence of allegations that Unocal's misconduct consisted of anything more than knowledge of the soldiers' alleged actions and profiting from them,[2] Unocal could not win Rule 12(b)(6) dismissal of the claims. *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000). After several years of extensive discovery, Unocal eventually prevailed in the district court on summary judgment, only to have that victory overturned by a Ninth Circuit panel. *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir.), *reh. en banc granted*, 395 F.3d 978 (9th Cir. 2002). After *Sosa* was decided but before the case could be reheard *en banc*, the parties entered into a confidential settlement. Published accounts suggest that Unocal paid close to $30 million to settle the case. *See* Paul Magnusson, "A Milestone for Human Rights," *Business Week*, Jan. 24, 2005, at 63.

Unocal is hardly alone among American corporations in facing insubstantial allegations under the ATS that it violated a international law norm accepted by the civilized world by aiding and abetting a foreign government's alleged mistreatment of its own citizens. Dozens of such suits are pending following unsuccessful efforts to win dismissal under Rule 12(b)(6).

California Unfair Competition Law. California's unfair competition law (UCL), Cal. Bus. & Prof. Code § 17200, permits private individuals to sue businesses that engage in unfair competition and to seek injunctive relief and/or restitution. The UCL has become a favorite tool of

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[2] Indeed, it is doubtful that aiding and abetting others' violations of customary international law would meet *Sosa*'s exacting standards regarding what is actionable under the ATS.

those seeking to improve working conditions at overseas factories that produce goods sold in this country. Those individuals often initiate publicity campaigns against American companies that import goods made in factories that, in the view of those individuals, enforce substandard working conditions. If the companies respond by denying the charges, they often find themselves the target of a suit filed under the UCL, alleging that the company engaged in an unfair business practice by falsely denying the charges. In many cases, the plaintiffs do not even allege that they were injured by the alleged unfair competition.[3] Suits following this pattern are pending both in California state courts and in federal court. *See generally,* Mathieu Blackston, *California's Unfair Competition Law – Making Sure the Avenger Is Not Guilty of the Greater Crime,* 41 SAN DIEGO L. REV. 1833 (2004).

The most famous suit of this type involved Nike, Inc., whose products are manufactured by subcontractors at more than 700 facilities around the world. Nike was sued under the UCL for issuing statements denying that workers at those overseas facilities were subject to substandard working conditions. Although the lower courts sustained a demurrer, the California Supreme Court reinstated the suit, holding that Nike's speech was subject to regulation by means of UCL lawsuits because it was commercial speech that was not entitled to full First Amendment protection. *Kasky v. Nike, Inc.,* 27 Cal. 4th 939 (2002). This Court granted a writ of certiorari to consider Nike's First Amendment claims, then

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[3] California voters in 2004 adopted Proposition 64, which amended the UCL to add a requirement that private suits to enjoin allegedly unfair competition could only be brought by those claiming to have been injured by the allegedly objectionable conduct. *See* Cal. Bus & Prof. Code § 17203. Nonetheless, many UCL cases are being filed by plaintiffs with highly attenuated damage claims.

later dismissed the writ as improvidently granted. *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (per curiam). Nike soon thereafter agreed to settle the case rather than continue to incur substantial discovery costs.

Although *Nike* was decided on First Amendment grounds, an issue in many of the UCL cases challenging a corporation's denial of substandard labor conditions at overseas manufacturing facilities is that the claims of falsity are often quite vague and do not identify *specific* factual claims that are alleged to be false. *See, e.g., Doe v. Wal-Mart Stores, Inc.*, No. CV 05-7307 NM (C.D. Calif.) (motion to dismiss pending). Nonetheless, despite the absence of specific allegations of falsity, federal courts hearing such claims have generally allowed the cases to proceed to full discovery.

Antitrust Claims. The problem of factually unsupported antitrust complaints being permitted to proceed through the pleadings stage is by no means confined to Section 1 cases. Perhaps the most notorious example of a baseless antitrust case being allowed to go forward is the federal government's monopolization claim against IBM, filed in 1969 and not dismissed until the early 1980s. The government ultimately moved to dismiss the case voluntarily on the ground that it was "without merit" – presumably a concession that the case should not have survived a Rule 12(b)(6) motion to dismiss. *In re: International Business Machines, Inc.*, 687 F.2d 591, 594 (2d Cir. 1982). Yet, the case was permitted to go through six years of discovery and seven years of trial, at a cost to the government of $16.8 million and a cost to IBM of between $50 and $100 million. *See* Justine O'Dell, *Trouble Abroad: Microsoft's Antitrust Problems Under the Law of the European Union*, 30 GA. J. INT'L & COMP. L. 101, 115 (2001).

In *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519 (1983), this Court commented directly on the inappropriate failure of the lower courts to dismiss an antitrust case on the pleadings. *Associated General Contractors* involved a suit under § 4 of the Clayton Act by a labor union against certain employers alleged to have engaged in a group boycott of unionized subcontractors. The Ninth Circuit allowed the suit to go forward; not until eight years after suit was filed did this Court dismiss the case on the pleadings. The Court made clear that the lower courts should never have permitted the case, which required the defendants to incur significant expenses, to proceed past an initial motion to dismiss: "Had the District Court required the Union to describe the nature of the alleged coercion with particularity before ruling on the motion to dismiss, it might well have been evident that no violation of the law had been alleged." *Associated General Contractors*, 459 U.S. at 521.

Review is warranted to provide guidance to the lower federal courts regarding the importance of granting Rule 12(b)(6) motions to dismiss if, after accepting all facts alleged in the complaint as true and drawing all reasonable inferences in the plaintiff's favor, the court nonetheless finds that the complaint fails to state a claim upon which relief can be granted. As the Court has recognized, permitting claims to proceed past the pleadings stage, particularly in complex antitrust cases, forces a defendant "to bear [a] substantial 'discovery and litigation' burden." *Hoover v. Ronwin*, 456 U.S. 558, 580 n.34 (1984). Moreover, the threat of unfounded yet expensive antitrust litigation will often deter firms from engaging in the vigorous competition that the antitrust laws were meant to encourage. *See* William H. Wagener, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Anti-Trust Litigation*, 78 N.Y.U. L. REV. 1887, 1921

n.8 (2003) ("If plaintiffs can extract sizable settlements by filing frivolous lawsuits capable of surviving motions to dismiss, potential defendants will avoid engaging in any behavior that could be construed as anticompetitive, further dampening these firms' incentives to compete aggressively."). The lower federal courts need to be reminded that "if the allegations of the complaint fail to establish the requisite elements of the cause of action, our requiring costly and time consuming discovery and trial work would represent an abdication of our judicial responsibility." *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549, 553 (7th Cir. 1980).

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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